86

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SUPREME COURT, U.S.

(5)

No. 07-906

IN THE

Supreme Court of the United States

ROHM AND HAAS PENSION PLAN,

Petitioner,

v.

GARY WILLIAMS,
Individually and on Behalf of Others
Similarly Situated,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

I. THE DECISION BELOW CANNOT BE RECONCILED WITH OTHER CIRCUITS' INTERPRETATIONS OF THE TERM "ACCRUED BENEFIT" UNDER ERISA 2

II. THE DECISION BELOW RESTS ON AN ERRONEOUS READING OF ERISA'S PLAIN LANGUAGE AND A MISUNDERSTANDING OF ITS STATUTORY OBJECTIVES 5

III. THE DECISION BELOW HAS FAR-REACHING IMPLICATIONS FOR ALL DEFINED BENEFIT PENSION PLANS 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Alessi v. Raybestos-Manhattan, Inc.,
451 U.S. 504 (1981) 5

Ashenbaugh v. Crucible, Inc., 1975 Salaried Retirement Plan,
854 F.2d 1516 (3d Cir. 1988) 4

Bd. of Trs. of the Sheet Metal Workers' Nat'l Pension Fund v. Comm'r,
318 F.3d 599 (4th Cir. 2003) 2, 3

Cent. Laborers' Pension Fund v. Heinz,
541 U.S. 739 (2004) 6

Chevron USA, Inc. v. Nat'l Res. Def. Council, 467 U.S. 837 (1984) 9

De Nobel v. Vitro Corp.,
885 F.2d 1180 (4th Cir. 1989) 4

Egelhoff v. Egelhoff,
532 U.S. 141 (2001) 4

Mead Corp. v. Tilley,
490 U.S. 714 (1986) 1

San Diego AFL-CIO Bus Drivers Local Div. 1309 of the Amalgamated Transit Union v. San Diego Transit Corp.,
1994 WL 198663 (9th Cir. 1994) 3

Shaw v. Int'l Ass'n of Machinists & Aerospace Workers Pension Plan,
750 F.2d 1458 (9th Cir. 1985) 4, 5

STATUTES

I.R.C. § 411(a)(7)(A)(i) 2

29 U.S.C. § 1002(23)(A) 5, 6, 8

29 U.S.C. § 1054(g)(1)-(2) 8

REGULATIONS

Treas. Reg. § 1.401(a)-20 10

Treas. Reg. § 1.411(d)-3 ..... 8, 9, 10

Treas. Reg. § 1.411(d)-4 7

OTHER AUTHORITIES

Craig Copeland, *Retirees with Pension Income and Characteristics of Their Former Job*, Notes (Employee Benefit Research Inst.), Feb. 2003 11

H.R. Rep. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S.C.C.A.N. 3670 8

REPLY BRIEF FOR PETITIONER

Respondent fails to come to terms with the lower courts' conflicting approaches to defining the scope of a plan participant's "accrued benefit" under the Employee Retirement Income Security Act ("ERISA"). Indeed, respondent makes no serious effort to reconcile the definition of "accrued benefit" endorsed by the Seventh Circuit in the decision below—which applied a *per se* rule that, regardless of a plan's terms, any cost-of-living adjustment ("COLA") constitutes part of a plan participant's "accrued benefit"—with the interpretive approach of the Fourth and Ninth Circuits, which determine the scope of a participant's "accrued benefit" using a case-by-case inquiry focused on the terms of the plan itself.

Respondent largely side-steps this clear split in interpretive methodology, and instead offers scattershot arguments based on superficial factual distinctions, opaque legislative history, and irrelevant agency pronouncements. None of these arguments can obscure the lower courts' widespread confusion regarding the definition of "accrued benefit" or detract from the exceptional "importan[ce]" of this issue. *Mead Corp. v. Tilley*, 490 U.S. 714, 726 n.11 (1986).

This Court's review is warranted to provide an authoritative answer to this sharply disputed and frequently recurring issue of ERISA plan interpretation, and to correct the Seventh Circuit's erroneous conclusion that the COLA offered by the Rohm and Haas Pension Plan ("Plan") constitutes part of the participants' "accrued benefit" even though the Plan explicitly *excludes* the COLA from its definition of that term. The uncertainty generated by this circuit

split undermines ERISA's statutory objectives and compromises the long-term interests of plan participants.

I. THE DECISION BELOW CANNOT BE RECONCILED WITH OTHER CIRCUITS' INTERPRETATIONS OF THE TERM "ACCRUED BENEFIT" UNDER ERISA.

In direct conflict with the Seventh Circuit's holding that every COLA offered by a defined benefit pension plan is *per se* a component of the plan participants' "accrued benefit," the Fourth and Ninth Circuits have endorsed a case-by-case inquiry to determine whether a COLA or other plan feature is part of the participants' "accrued benefit." The simplistic factual distinctions that respondent draws between the decision below and the Fourth and Ninth Circuits' decisions do nothing to detract from the existence of this methodological conflict.

A. In *Board of Trustees of the Sheet Metal Workers' National Pension Fund v. Commissioner*, 318 F.3d 599 (4th Cir. 2003), the Fourth Circuit held that a COLA was not part of the "accrued benefit" of plan participants who had retired before the COLA was implemented because the terms of the plan did not include a COLA as an element of those participants' "accrued benefit." *Id.* at 605. The court explained that the "definition [of 'accrued benefit'] does not purport to describe what counts as an 'accrued benefit' for *all* participants in *all* qualifying plans. Rather, the statutory definition is a signpost directing us to look to the terms of the plan at issue." *Id.* at 602-03 (citing I.R.C. § 411(a)(7)(A)(i)) (emphases added). The statutory definition of "accrued benefit," the court continued, "does not describe what a given plan participant's accrued benefit would be. The

statute leaves this level of detail to plan drafters." *Id.* at 603.

Respondent does not address the stark methodological conflict between the Fourth Circuit's approach to defining "accrued benefit"—which "look[s] to the terms of the plan at issue" (*Sheet Metal Workers*, 318 F.3d at 603)—and the Seventh Circuit's holding that the "term 'accrued benefit' has a statutory meaning" that "the parties cannot change" by varying the terms of the plan. Pet. App. 6a. Respondent instead emphasizes that, in *Sheet Metal Workers*, the plan had been amended to include a COLA only after the participants in question had retired, while the Rohm and Haas Pension Plan included a COLA during respondent's employment. Opp. 10. This irrelevant distinction does not alter the fact that the Fourth and Seventh Circuits have adopted squarely conflicting approaches to defining the scope of a participant's "accrued benefit." In the Fourth Circuit, the terms of the plan are controlling; in the Seventh Circuit, the "statutory meaning" overrides the terms of the plan and mandates inclusion of any COLA offered by the plan within the participants' "accrued benefit."

Respondent has no greater success in reconciling the decision below with the Ninth Circuit's holding in *San Diego AFL-CIO Bus Drivers Local Division 1309 of the Amalgamated Transit Union v. San Diego Transit Corp.*, 1994 WL 198663 (9th Cir. 1994). In that case, the court concluded that a COLA was not part of the plan participants' "accrued benefit" because the terms of the plan expressly limited the COLA's operation to a two-year period. *Id.* at *4. Respondent does little more than restate the holding of the case in an apparent effort to distinguish it on the ground that the COLA in the Rohm and Haas

Pension Plan is not temporally limited. Opp. 10. But this factual difference between the plans has absolutely no bearing on the methodological conflict between the Ninth Circuit—which examines a plan's terms to determine whether a plan feature is an "accrued benefit"—and the Seventh Circuit—which construes the statutory definition of "accrued benefit" to supersede the terms of the plan.

This methodological inconsistency regarding the definition of one of ERISA's most fundamental terms substantially undermines the "uniform administrative scheme" that ERISA was designed to establish (*Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001)), and creates a compelling need for this Court's review.

B. Respondent also does not seriously confront the broader conflict between the Seventh Circuit's *per se* approach to defining a plan participant's "accrued benefit" and decisions in which other circuits have deferred to the terms of the particular plan at issue to determine whether a plan feature constituted part of a participant's "accrued benefit."

Outside of the COLA context, the Third, Fourth, and Ninth Circuits all look to the terms of the plan to define the scope of the plan participants' "accrued benefit." *See Shaw v. Int'l Ass'n of Machinists & Aerospace Workers Pension Plan*, 750 F.2d 1458, 1465 (9th Cir. 1985) ("[T]he material available for interpreting ERISA's definition of 'accrual' always refers to the terms of the pension plan itself."); *see also Ashenbaugh v. Crucible, Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1524 (3d Cir. 1988); *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1194 (4th Cir. 1989).

Respondent makes almost no attempt to reconcile the case-by-case, plan-specific analysis in these decisions with the Seventh Circuit's refusal to defer to the terms of the Plan in defining the scope of a participant's "accrued benefit." For example, although the Ninth Circuit in *Shaw* "rejected a plan's contention that a COLA-like provision was not an accrued benefit" (Opp. 16 (emphasis omitted)), it "referr[ed] to the terms of the pension plan itself" in reaching that conclusion. 750 F.2d at 1465. It is the refusal of the Seventh Circuit to defer to the terms of the Plan—and its insistence on using the "statutory meaning" of "accrued benefit" to vary those terms—that place the Seventh Circuit at odds with the Ninth Circuit.

These conflicting methodologies are a source of confusion to plan actuaries and plan participants alike, who require certainty regarding the definition of "accrued benefit" to make informed decisions about plan funding and retirement planning. Only this Court can authoritatively resolve this interpretive inconsistency.

II. THE DECISION BELOW RESTS ON AN ERRONEOUS READING OF ERISA'S PLAIN LANGUAGE AND A MISUNDERSTANDING OF ITS STATUTORY OBJECTIVES.

Consistent with this Court's recognition that "private parties, not the Government, control the level of benefits" provided by an ERISA plan (*Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981)), ERISA provides that the "accrued benefit" of participants in a defined benefit pension plan is an "individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age." 29

U.S.C. § 1002(23)(A). The statutory definition reflects the fact that ERISA was not designed to dictate the level of benefits provided to plan participants but instead to "protect[ ] employees' justified expectations of receiving the benefits their employers promise them" under the terms of an ERISA pension plan. *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004). The Seventh Circuit's unwillingness to defer to the terms of the Plan in defining the scope of the participants' "accrued benefit" disregards the plain language of ERISA and undermines the flexibility that the statute affords to plan sponsors in determining the scope of plan benefits.

To defend this countertextual and counterintuitive result, respondent first argues that the Seventh Circuit did not ignore the terms of the Plan because two versions of the Plan were included in the record, the parties discussed the Plan's provisions in their briefs, and the court referenced the Plan's terms in its decision. Opp. 2. But the fact that the Seventh Circuit had the Plan documents available to it and referred to the Plan's terms in its decision does not establish that the court properly "determined" the scope of the participants' "accrued benefit" "under the plan," as ERISA requires. 29 U.S.C. § 1002(23)(A). Indeed, the Seventh Circuit emphatically refused to defer to the Plan's terms—acknowledging that the Plan defines "the COLA to be an enhancement that is awarded to annuitants, over and above the accrued benefit" (Pet. App. 6a), but nevertheless concluding that the COLA was a component of the participants' "accrued benefit" because the "term 'accrued benefit' has a statutory meaning" that the parties cannot vary. *Id.* (internal quotation marks omitted).

Respondent also appears to take issue with the proposition that the terms of the Plan exclude the COLA from the definition of "accrued benefit," and devotes several pages to attempting to demonstrate that the decision to award the COLA is not "discretionary" under the Plan. Opp. 2-7. It has been undisputed throughout this litigation, however, that the Plan does not include the COLA within its definition of "accrued benefit." *See* Pet. App. 4a ("The parties agree that the plain terms of the Plan exclude the COLA from a participant's accrued benefit."); *see also* Pet. for Writ of Cert. 6 n.2. The only issue before the Seventh Circuit—and the only issue presented by this petition—is whether ERISA's provisions override the decision of the Plan's drafters to exclude the COLA from the definition of "accrued benefit." It is far too late for respondent to backtrack on his concession that, under the terms of the Plan, the COLA is excluded from the scope of the participants' "accrued benefit."[1]

Respondent also argues that the COLA is an "accrued benefit" because it "accrues over time as the employee provides service to the employer" and "increases the dollar amount of each participant's retirement annuity." Opp. 12, 14. But most retirement-type subsidies accrue over time and increase the dollar amount of a participant's annuity. *See*

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[1] Respondent's contention (at 8-9) that the Plan has shifted its litigating position in this case is makeweight. The Plan has consistently argued throughout this litigation that "ERISA's statutory definition of 'accrued benefit' . . . provides that a plan participant's accrued benefit is defined solely by the terms of the relevant pension plan" and that the Plan's COLA therefore is not a component of the participants' "accrued benefit." C.A. Br. of Pet'r 12 (emphasis omitted). That was the issue decided by the Seventh Circuit and is the one presented in this petition.

Treas. Reg. § 1.411(d)-4, Q&A-1(a) (retirement-type subsidies are subject to statutory protection from cutback "to the extent they have accrued"). This does not mean that retirement-type subsidies are part of a participant's "accrued benefit." *See* 29 U.S.C. § 1054(g)(1)-(2) (a participant's "accrued benefit" is protected from cutback under subsection (g)(1), while a retirement-type subsidy is protected under subsection (g)(2)); Treas. Reg. § 1.411(d)-3(g)(6)(iv) (a retirement-type subsidy provides a retirement benefit in excess of the value of a participant's "accrued benefit").

Respondent's effort to invoke ERISA's legislative history to support the Seventh Circuit's holding is equally unavailing. Opp. 14 (quoting H.R. Rep. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S.C.C.A.N. 3670, 4726). The passage selectively quoted by respondent—which states that "[i]t is necessary to provide a statutory definition of 'accrued benefit'" (Opp. 14 (emphasis omitted))—continues on to explain that, "[i]n the case of a defined benefit plan the bill provides that the accrued benefit is to be determined under the plan, subject to certain requirements." 1974 U.S.C.C.A.N. at 4726.[2] The legislative history thus does nothing more than restate the statutory definition of "accrued benefit"—which requires a participant's "accrued benefit" to be "determined under the plan." 29 U.S.C. § 1002(23)(A).

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[2] With the exception of the parties' disagreement about whether the COLA constitutes part of the participants' "accrued benefit," it is undisputed that all of the "requirements" listed in the legislative history are satisfied in this case. In fact, the legislative history is clear that subsidies provided in addition to the value of the "accrued benefit" are not part of the "accrued benefit."

Moreover, respondent is unable to wrest any support from the IRS announcements quoted at length in his brief. *See* Opp. 19-22. Those IRS announcements explain that, where a plan offers a COLA as a component of the participants' normal retirement benefit, the plan must provide the COLA to a participant who separates from employment before retirement or who selects a lump-sum distribution of benefits. The Rohm and Haas Pension Plan, in contrast, *excludes* the COLA from its participants' normal retirement benefit and provides that the COLA is "an enhancement that is awarded to annuitants, over and above the accrued benefit." Pet. App. 6a. None of the IRS announcements addresses this particular plan structure—and even if they did, they could not alter the unambiguous language of ERISA itself, which looks to the terms of the plan at issue to define the participants' "accrued benefit." *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

Finally, respondent mistakenly contends that a COLA that increases benefits beginning at or after normal retirement age cannot be a retirement-type subsidy because the concept of a retirement-type subsidy refers only to "amounts paid to early retirees above their normal pension benefits." Opp. 17 (internal quotation marks omitted). An early retirement subsidy, however, is only one example of a retirement-type subsidy. *See* Treas. Reg. § 1.411(d)-3(g)(6)(iv) ("*Examples* of retirement-type subsidies include a subsidized early retirement benefit and a subsidized qualified joint and survivor annuity.") (emphasis added). The other example given is a subsidized qualified joint and survivor annuity. By law, a qualified joint and survivor annuity ("QJSA") must be offered at any age a participant is eligible to re-

ceive a distribution under the plan, including at or after normal retirement age. *Id.* § 1.401(a)-20, Q&A-10 ("If a participant is alive on the annuity starting date, the benefits must be payable as a QJSA."). Furthermore, if any form of distribution at that age is subsidized, the qualified joint and survivor annuity must be subsidized as well. *Id.* § 1.401(a)-20, Q&A-16 ("the QJSA must be at least as valuable as any other optional form of benefit payable under the plan at the same time"). Thus, any retirement-type benefit that continues after retirement and that is in excess of the actuarial present value of the participant's "accrued benefit" can be a retirement-type subsidy. *See id.* § 1.411(d)-3(g)(6)(iii), (iv). A COLA that increases benefits beginning after normal retirement age, when identified by the terms of the plan as separate and in addition to a participant's normal retirement benefit, is just such a benefit.[3]

III. The Decision Below Has Far-Reaching Implications For All Defined Benefit Pension Plans.

Nothing in respondent's brief diminishes the exceptional importance of this case for all defined benefit pension plans. The Seventh Circuit's definition of "accrued benefit" enables courts to expand the scope of a plan participant's "accrued benefit" in direct contravention of the terms of the plan. In so doing, the Seventh Circuit's decision upsets the settled funding expectations of plan actuaries and exacerbates the Nation's already serious pension crisis.

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[3] The circuits' widespread and long-standing confusion about the distinction between an "accrued benefit" and a retirement-type subsidy reinforces the compelling need for this Court's review. *See* Br. of the U.S. Chamber of Commerce at 15-16.

Respondent's suggestion (at 23-24) that the legal status of a COLA has only minimal importance to defined benefit pension plans and their participants is resoundingly refuted by the fact that approximately 17% of private-sector retirees receive benefits under a defined benefit pension plan that includes a COLA. Br. of the U.S. Chamber of Commerce at 2 (citing Craig Copeland, *Retirees with Pension Income and Characteristics of Their Former Job*, Notes (Employee Benefit Research Inst.), Feb. 2003, at 5-6). Moreover, the implications of this case extend well beyond the COLA setting, and reach any benefit enhancement that a defined benefit pension plan excludes from its definition of "accrued benefit."

Respondent also tries unsuccessfully to conceal the substantial risk of plan underfunding generated by the Seventh Circuit's decision. While respondent may be correct that "the financial cost to plans is the same whether a participant receives the COLA as part of his accrued benefit . . . or . . . through a discounted lump sum" (Opp. 23), this equivalent "financial cost" does not alter the fact that plans that explicitly exclude the COLA from their definition of "accrued benefit" are funded on the assumption that they will not be required to pay a COLA to participants who select a lump-sum distribution of their benefits. Where a court overrides the plan's terms and holds that *all* plan participants are entitled to the COLA, the plan is faced with the prospect of absorbing this new and unforeseen liability. Because many defined benefit pension plans are already chronically underfunded (*see* Pet. for Writ of Cert. 25), the financial implications of such a unilateral rewriting of plan terms can be devastating for both the plan and its participants.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 19, 2008

79

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH W. JOHNSON,
Petitioner,

v.

JESSE GADSON, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the
District of Columbia
Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS FOR THE APPENDIX

United States Court of Appeal's

Orders, Opinions or Judgments
are located in the Appendix as follows:

October 9, 2007 JUDGMENT w/o Memo..... 1

September 24, 2007 ORDER..... 3

United States District Court's

Orders, Opinions or Judgments
are located in the Appendix as follows:

September 19, 2006 ORDER..... 4

September 20, 2006 Amended Memorandum..... 5

October 23rd, 2006 Memorandum Opinion/Order. 16

November 9th, 2006 ORDER..... 21

United States Court of Appeals
For The District of Columbia Circuit

No. 06-7171

September Term, 2007
06cv00022
Filed On: October 9, 2007

Kenneth W. Johnson,
Appellant

v.

Jesse Gadson, et al.,
Appellees

Consolidated with 06-7204

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the judgment of the district court be affirmed. The district court correctly concluded that appellant's complaint failed to state a claim upon which relief could be granted.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals
For The District of Columbia Circuit

No. 06-7171 September Term, 2007
06cv00022
Filed On: September 24, 2007

[1068846]
Kenneth W. Johnson,
Appellant
v.
Jesse Gadson, et al.,
Appellees

Consolidated with 06-7204

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion for oral argument, the response thereto, and the reply, it is

ORDERED that the motion be denied. Oral argument will not assist the court in this case. Accordingly, the court will dispose of the appeal without oral argument on the basis of the record and the presentations in the briefs. See Fed. R. App. P 34(a)(2); D.C. Cir. Rule 34(j).

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH W. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No.**
	)	**06-22 (RWR)**
STACEY LEWIS et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that defendants' motions to dismiss be, and hereby are, GRANTED. The complaint is DISMISSED. It is further

ORDERED that plaintiff's motion to admit videotape evidence and defendant Lee's motion to strike the motion be, and hereby are, DENIED as moot.

This is a final, appealable Order.

SIGNED this 19th day of September, 2006

/s/

RICHARD W. ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH W. JOHNSON,	)	
Plaintiff,	)	
v.	)	Civil Action No. 06-22 (RWR)
STACEY LEWIS et al.,	)	
Defendants.	)	

AMENDED MEMORANDUM OPINION

Pro se plaintiff Kenneth W. Johnson has filed an action against several individuals and a law firm, alleging violation of his civil rights under 42 U.S.C. §§ 1981 and 1983, legal malpractice, and intentional infliction of emotional distress. Each defendant[1] has moved to dismiss the complaint for failure to state a claim.[2] Because Johnson does not

[1] The complaint was dismissed as to defendants Stacy Lewis and Robert Mance because those defendants were not served with a summons and complaint.

[2] Defendants also argue that issue preclusion and the statute of limitations should bar this action. These contentions are without merit. Issue preclusion does not apply here because the events giving rise to the claims against the moving defendants have never before been litigated. The three-year D.C. statute of limitations on personal injury claims, D.C. Code § 12-301(8), which applies here by operation of a Supreme Court decision, Owens v. Okure, 488 U.S. 235, 249-

state a claim under the civil rights statutes, those claims will be dismissed, and supplemental jurisdiction of the state law claims will be declined under 28 U.S.C. § 1367(c)(3).

BACKGROUND

Johnson, a man of mixed racial ancestry who alleges that he "looks either Caucasian/European or predominately Caucasian/European" (Am. Compl. at 6), complains because none of the defendants, all attorneys, agreed to represent him in his pursuit of legal remedies relating to matters that occurred in 1997 when he was arrested, tried, and acquitted in the Superior Court for the District of Columbia.[3] On the basis of these refusals, he alleges race discrimination, legal malpractice, and intentional infliction of emotional distress.

According to Johnson, he approached attorney Jesse Gadson in 2002 about filing a claim

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50 (1989), does not bar this action because Johnson filed this action on January 9, 2006, complaining of events that occurred no earlier than January 15, 2003. See also, Carter v. District of Columbia, 14 F.Supp. 2d 97, 102 (D.D.C. 1998) (stating that plaintiffs in this court "have the right to bring a Section 1981 or a Section 1983 claim at any time within three years of the alleged discrimination").

[3] The complaint itself, exclusive of the five volumes of attached exhibits, is 104 pages long, argumentative, and far from the "short and plain statement of a claim," or "simple, concise and direct" averment that Fed.R.Civ.P. 8(a)(2) and (e) requires.

for post-judgment relief, but Gadson declined and directed Johnson to the public law section of the Library of Congress. (Am. Compl. at 40-41.) Johnson visited Gadson again sometime shortly before January 15, 2003, because Gadson had given him more time and more valuable information than had any other attorney Johnson had contacted. (Id. at 41.) On January 15, 2003, Gadson entered into a contract with Johnson for the limited purpose of "investigat[ing] the possibility of filing a law suit against the District of Columbia government." (Id. at 40, 50 (quoting agreement between Gadson and Johnson).) After conducting the agreed-upon investigation, and viewing additional materials at Johnson's request, Gadson again declined to represent Johnson, expressly because Gadson felt he did not have the experience necessary for the case.4 (Id. at 44.)[4]

According to the amended complaint, in September 2003, Johnson asked Tony Lee, an attorney and partner in the law firm McGuireWoods, LLP,[5] to "provide legal counsel on filing a motion to set aside the prior judgment in Johnson v. District of Columbia . . . C.A. 3837-98 before the Superior Court of the District of

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[4] Johnson, pro se, filed an action against the District of Columbia on June 4, 2003, which was dismissed on a motion to dismiss that was filed in late July 2003, because the claims were time barred. See Johnson v. District of Columbia, Civil Action 03-1218 (CKK) (D.D.C. Oct. 14, 2003).

[5] McGuireWoods is also a defendant, but without stating so, Johnson alleges McGuireWoods' liability by only through the acts of Lee. (See Am. Compl. at 68-78.)

Columbia pursuant to [R]ule 60(b). . . . And asked Tony Lee to have the July 15, 1998 judgment vacated. He refused[]!" (Am. Compl. at 53.) The amended complaint recounts some of the advice Lee gave Johnson and his conclusion that Lee could not help Johnson in his efforts. (Id. at 53-54.) The facts Johnson alleges suggest that Lee made a contract with Johnson and, as agreed, provided legal counsel to him.

Johnson alleges that he spoke to attorney Elbert Shore on April 15, 2004, about Shore entering an appearances in an action Johnson had filed pro se three days earlier captioned Johnson v. Mance, asserting claims relating to events occurring in 1997 and another event occurring in 2004.[6] (Am. Compl. at 66.) Johnson alleges that he paid Shore a $75.00 consultation fee and presented Shore with the facts underlying the Mance action, that Shore asked and was told about Johnson's mixed racial ancestry, and that Shore refused to represent Johnson in the matter. (Id.)

Then, sometime in June 2004, Johnson attempted to engage the legal services of Harold N. Harmon and Robert F. Condon. Johnson "offered his [pending *pro se*] lawsuit against Robert Mance" to Harmon and Condon and told them of the facts

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[6] On August 6, 2004, the complaint was dismissed because the claims pled either failed to state a claim upon which relief could be granted or were barred by the statute of limitations. See Mem., Johnson v. Mance, Civil Action No. 04-591 (JR) (D.D.C. Aug. 5, 2004).

in the case. (Id. at 62.) A motion to dismiss in that case had been filed on June 7, 2006. Harmon and Condon later sent Johnson a retainer agreement, but before the agreement reached Johnson, the case was dismissed. (Id.) After Johnson informed Harmon and Condon that the case had been dismissed, they responded in a letter: "Please be advised that we will not be able to represent you in your case that was dismissed by Judge Robertson in the U.S. District Court or in your current Motion for Summary Reversal filed in the U.S. Court of Appeals for the District of Columbia." (Id.)

Johnson alleges that the defendants' refusals were racially discriminatory and deprived him of his civil rights in violation of 42 U.S.C. §§ 1981 and 1983. He also alleges that these same refusals constituted legal malpractice and the intentional infliction of emotional distress, in violation of state common law.

DISCUSSION

Defendants have moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) dismissal is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). A "complaint should not be dismissed unless plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. . . To that end, the complaint is construed liberally

in the plaintiffs' favor, and we grant plaintiffs the benefit of all inferences that can be derived from the facts alleged. . . . However, the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994) (citations omitted).

I. THE FEDERAL CIVIL RIGHTS CLAIMS

A. Claim for discrimination under 42 U.S.C. § 1981

Johnson alleges that all defendants violated § 1981 when they "refused to either make or enforce a contract with Johnson, because Johnson is a predominately Caucasian U.S. Citizen, who has scant physical evidence of any African blood or ancestry . . . ." (Am. Compl. at 6.) Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." Johnson claims that the black defendants — who are not identified — have discriminated against him because he appears white. (Am. Compl. at 6.) He also alleges that white defendants — who are not identified — have discriminated against him because although he appears white, they knew of his black ancestry. (Id.) The only defendant Johnson alleges knew of his black ancestry is Elbert Shore. (Id. at 66.)

Johnson infers race-based discrimination by all the defendants, but for each defendant, that inference enjoys no support from the facts Johnson pleads. First, Johnson alleges that he was perceived as a white citizen by all defendants except Shore, who knew of his black ancestry. (Am. Compl. at 6, 66.) White plaintiffs certainly may sue under § 1981. However, because § 1981 entitles all persons to the same contracting rights as are "enjoyed by white citizens," Johnson's allegations that defendants saw him as white and treated him like a white person because he is mostly white hardly states a claim grounded in some differential treatment based upon race that is cognizable under § 1981. See MacInstosh v. Building Owners & Managers Ass'n Intern., 355 F. Supp. 2d 223, 226 (D.D.C. 2005) (discussing how although a § 1981 plaintiff need not be a person of color, the conduct complained of must involve some racially motivated differentiation (citing Glymph v. District of Columbia, 211 F. Supp. 2d 152, 154 (D.D.C. 2002))).

Second, other facts Johnson alleges do not support an inference of race-based discrimination as to any of the defendants, including Shore. Johnson pleads facts that establish that each defendant met with Johnson, agreed to evaluate his case and then, only after evaluating the merits of Johnson's case, declined to provide representation. In the case of each defendant, the facts Johnson pleads demonstrate that each defendant was either willing to (Harmon & Condon), or did (Gadson, Lee, Shore), make a contract with

Johnson, some only for the limited purpose of evaluating or providing legal advice on the efficacy of pursuing a claim.[7] In the case of each defendant, the facts Johnson alleges reflect that the representation was declined for professional (Gadson) or legal (Lee, Shore, Harmon & Condon) reasons. Even with respect to Shore, Johnson's allegations do not support an inference of race based discrimination in contracting. Shore agreed to provide a legal consultation and did so. Then, after learning of the facts of the case, he declined to represent Johnson in the already filed Johnson v. Mance action.

In short, Johnson's factual allegations do not support an inference of race-based discrimination. The only suggestions of race-based conduct in the complaint are the sweeping and factually unsupported conclusions asserted by Johnson. Such conclusions, devoid of factual support, are not credited on a motion to dismiss. Kowal, 16 F.3d at 1276 (noting that a court is not required to "accept legal conclusions cast in the form of factual allegations"). Accordingly, the § 1981 claim as to each defendant will be dismissed for failure to state

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[7] Johnson appears to harbor the belief that if he pays an attorney for legal advice and then wants to pursue a course of action against legal advice, that he can command an attorney to represent him. This is not necessarily so. An attorney is both a professional and an officer of the court who is not only entitled, but also obligated, to use his professional legal judgment in accord with his ethical responsibilities to decline to make arguments or representations that are not supported in either fact or law.

a claim upon which relief may be granted. Fed. R. Civ. P. 2(b)(6).

B. Claim for discrimination under 42 U.S.C. § 1983

Johnson alleges that the defendants' refusals to represent him in his pursuit of legal remedies violated § 1983. Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." "To state a claim under section 1983, a plaintiff must allege both (1) that he was deprived of a right secured by the Constitution or laws of the United States, and (2) that the defendant acted 'under color of' the law of a state, territory or the District of Columbia." Hoai v. Vo, 935 F.2d 308, 312 (D.C. Cir. 1991) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970)).

First, as was true with Johnson's § 1981 claims, Johnson does not make factual allegations that reflect that he was deprived of any right secured by federal law. Second, Johnson does not allege that the defendants were state officials,[8] or

[8] An attorney licensed to practice law is not acting under color of law by dint of his membership in the bar and status as an

that they conspired with state officials or willfully engaged in joint activity with a state or its agents in their refusal to represent Johnson. See id. Accordingly, Johnson's allegations do not state a claim for which relief may be granted under 42 U.S.C. § 1983 and that claim will be dismissed as to each defendant.

II. THE STATE COMMON LAW CLAIMS

If "the district court has dismissed all claims over which it has original jurisdiction," the court may decline to exercise supplemental jurisdiction over remaining state law claims.[9] 28 U.S.C. § 1367(c)(3). Accordingly, supplemental jurisdiction over Johnson's state common law claims will be declined and those claims will be dismissed for lack of jurisdiction.

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officer of the court. See Polk v. Dodson, 454 U.S. 312, 318 (1981); Van Daele v. Vinci, 294 F. Supp. 71, 74 (N.D. Ill. 1968)("Merely acting under a state license is not state action within the context of the civil rights acts."); Sullivan v. Stein, No. Civ. 3:03 CV 1203 (MRK), 2004 WL 1179351, *11 (D. Conn. May 21,2004) ("It is well-settled . . . that private attorneys do not act under color of state law and are not state actors simply by virtue of their state-issued licenses to practice law.").

[9] Johnson asserts diversity jurisdiction. (See Compl. at 3; Am. Compl. at 3.) However, he fails to plead complete diversity of citizenship, and the face of the complaint (and of the amended complaint) reflect an absence of complete diversity. Both Johnson and defendant Shore have addresses in Maryland and Maryland citizenship has not been disputed. Thus, there is no diversity jurisdiction over this action under 28 U.S.C. § 1332(a).

CONCLUSION

Because Johnson's factual allegations do not state a claim under the civil rights statutes, those claims will be dismissed. Because supplemental jurisdiction of the state law claims will be declined under 28 U.S.C. § 1367(c)(3), those claims will be dismissed. Because the complaint will be dismissed, the two pending motions relating to admission of evidence will be denied as moot. A final, appealable Order accompanies this memorandum Opinion.

SIGNED this 20th day of September, 2006.

/s/
RICHARD W. ROBERTS
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH W. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 06-22 (RWR)**
	)	
STACEY LEWIS et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Kenneth W. Johnson has filed motions to reconsider and vacate an order dismissing his complaint. He has also filed a motion to admit evidence of his current and intended future domicile related to the issue of diversity jurisdiction. Because Johnson does not identify any reason with legal merit to reconsider or vacate the order, and because the offered evidence would not remedy the flaw in diversity jurisdiction, his motions will be denied.

BACKGROUND

Johnson filed a complaint asserting federal question, supplemental and diversity jurisdiction, and alleging violations of his federal civil rights under 42 U.S.C. §§ 1981 and 1983, legal malpractice and intentional infliction of emotional

distress. The federal civil rights claims were dismissed for failure to state a claim upon which relief could be granted. The common law claims were dismissed because the complaint did not establish diversity jurisdiction and supplemental jurisdiction was declined. See Memorandum Opinion & Order, Sept. 19, 2006. Johnson has moved for relief from the dismissal under Fed. R. Civ. P. 59(e) and 60(b)(2), and to admit evidence of his current and intended future domicile.

DISCUSSION

I. MOTIONS FOR RECONSIDERATION AND TO ADMIT DOMICILE EVIDENCE

A motion for reconsideration under Fed. R. Civ. P. 59 is not intended to provide a vehicle to reargue facts already presented. Messina v. Krakower, 439 F.3d 755, 759 (D.C. Cir. 2006) (affirming denial of Rule 59(e) motion where plaintiff did nothing more than rely on the same arguments originally made). Rather, such a motion "need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Id. at 758 (quotation marks and citation omitted).

Johnson contends that his complaint did not fail to state a claim upon which relief may be granted. (Pl.'s Mot. for Reconsideration at 1.) His argument, however, focuses primarily on his legal malpractice allegations, about which no finding

was made with respect to the sufficiency of the pleading. (Id. at 2-5.) Johnson has not identified a basis for reconsidering the decision as to the federal civil rights claims. He has, at the most, reargued facts already presented.

Johnson also argues in his motion for reconsideration that diversity jurisdiction exists. (Id. at 1.) In support of that argument, and attached to a motion to admit evidence, he filed an affidavit and documents demonstrating that he lives in Maryland and intends to remain domiciled in Maryland, and that at least one of the defendants is a Virginia citizen. Johnson's arguments and evidence do not meet the test of diversity jurisdiction, as diversity jurisdiction cannot be established on the basis of the citizenship of the plaintiff and one of multiple defendants. Diversity jurisdiction requires complete diversity between adversaries at the time the suit is filed, such that no defendant may be a citizen of the state of which any plaintiff is a citizen. [1] See Saadeh v. Farouki, 107 F.3d 52, 54-55 (D.C. Cir. 1997) (stating that "'federal diversity jurisdiction is lacking if there are any litigants from the same state on opposing sides.'" (citing Prakash v. American Univ., 727 F.2d 1174, 1178 n.25 (D.C. Cir. 1984)).

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[1] Johnson's point that defendant Elbert Shore, whose address on the face of the complaint was listed as Maryland, was not involved in the series of events giving rise to the asserted cause of action until April 15, 2004, is irrelevant. (Pl.'s Mot.for reconsideration at 13-14.)

MOTION TO VACATE

A motion for relief from a judgment or order may be based upon newly discovered evidence. Fed. R. Civ. P. 60(b)(2). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Fed. R. Evid. 401. Johnson argues that newly discovered evidence relating to his legal malpractice claims previously brought in Superior Court warrants granting his Rule 60(b)(2) motion. (Pl.'s Mot. to Vacate at 1.) What Johnson erroneously characterizes as newly discovered evidence is a memorandum opinion and judgment of the District of Columbia Court of Appeals issued September 28, 2006, affirming the District of Columbia Superior Court's orders denying Johnson's motions under Super. Ct. Civ. R. 60(b) in which Johnson asserted that his adversary had committed fraud upon the court. (See Mem. Op. & J., Johnson v. District of Columbia, Nos. 04-CV-115 and 04-CV-442 (D.C. Ct. App. Sept. 28, 2006) at 1 ("The trial court found no merit to the claims of fraud, and neither do we. We accordingly affirm.").) The decision of the appeals court does not constitute newly discovered evidence relevant to the federal civil rights claims, or any other claims, that Johnson asserted in his complaint in this case.

CONCLUSION AND ORDER

Because Johnson has not identified a sound legal basis for either reconsidering or vacating the order dismissing his complaint, and because the evidence he offered will not alter the conclusion that diversity jurisdiction was not established, Johnson's motions will be denied. Accordingly, it is hereby ORDERED that Johnson's motion for reconsideration of the September 19, 2006 order be, and hereby is, DENIED. It is further ORDERED that Johnson's motion to vacate the September 19, 2006 order be, and hereby is, DENIED. It is further ORDERED that Johnson's motion to admit evidence be, and hereby is, DENIED.

SIGNED this 23rd day of October, 2006.

/s/

RICHARD W. ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH W. JOHNSON,	)	
Plaintiff,	)	
v.	)	**Civil Action No.**
	)	**06-22 (RWR)**
STACEY LEWIS et al.,	)	
Defendants.	)	
	)	

ORDER

Plaintiff Kenneth W. Johnson has filed a motion seeking reconsideration of an order dated October 23, 2006 that denied Johnson's motion to vacate an order dismissing his complaint. Johnson's motion attempts to reargue facts and legal arguments already presented, but a motion for reconsideration under Fed. R. Civ. P. 59 is not a vehicle to reargue facts and argument already presented. See Messina v. Krakower, 439 F.3d 755, 759 (D.C. Cir. 2006) (affirming denial of Rule 59(e) motion where plaintiff did nothing more than rely on the same arguments originally made). Accordingly, it is hereby ORDERED that Johnson's motion for reconsideration of the October 23, 2006 order be, and hereby is, DENIED.

SIGNED this 9th day of November, 2006.

/s/
RICHARD W. ROBERTS
United States District Judge